

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR  
WASHINGTON, D.C.

DATE: ~~November~~ 12, 1991  
CASE NO. 79-CETA-181

IN THE MATTER OF

TERRY O'BOYLE,

COMPLAINANT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA or the Act), 29 U.S.C. §§ 801-999 (Supp. V 1981), <sup>1/</sup> and regulations promulgated thereunder at 20 C.F.R. Parts 675-680 (1990). On June 4, 1991, I issued a Decision and Order to Show Cause, proposing to affirm the Administrative Law Judge's (ALJ) finding that Complainant was improperly discharged from his position at the Meynard Correctional Center and her orders of reinstatement and backpay. My June 4 Order also proposed that payment of the backpay, with interest, would be due within nine months of my final order and that the Illinois Department of Corrections (IDOC) and the Illinois Department of Commerce and Community Affairs (IDCCA) were jointly and severally liable for all amounts due Complainant. The parties were given an opportunity to show cause why the decision and proposed conclusions and order should not be adopted as the final order.

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<sup>1/</sup> CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1501-1791 (1988), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

IDOC and IDCCA (Respondents) have responded jointly by moving to vacate or modify the Secretary's Decision and Order to Show Cause. Respondents initially argue that the Secretary's order, issued more than eleven years after the **ALJ's** decision in this case, violates the Administrative Procedure Act (**APA**) which provides that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b) (1988). Motion to Vacate or Modify (Motion) at 1-7.

Before an action may be set aside under the **APA** for lack of punctuality, the aggrieved party must show that it was prejudiced by the delay. City of Camden, New Jersey v. United States Department of Labor, 831 **F.2d** 449, 451 (3d Cir. 1987); Panhandle Cooperative Association, Bridgeport, Nebraska v. E.P.A., 771 **F.2d** 1149, 1153 (8th Cir. 1985); Estate of French v. Federal Energy Regulatory Commission, 603 **F.2d** 1158, 1167 (5th Cir. 1979). Because setting aside an agency decision is an extreme sanction, Panhandle, 771 **F.2d** at 1153, great care must be observed before doing so. Estate of French, 603 **F.2d** at 1167. Respondents' primary claim of prejudice is that they had a diminished ability to present a defense. <sup>2/</sup> Motion at 6-7. This contention is

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<sup>2/</sup> Respondents also claim prejudice as a result of their **backpay** liability increasing as time goes on. Motion at 6. They have cited no authority, however, and I am aware of none, which considers the accumulation of **backpay** liability to be grounds for vacating a decision awarding **backpay**. If, as Respondents state elsewhere, Motion at 22, Complainant's period of unemployment  
(continued...)

without merit because the case was accepted for review within one month of when the **ALJ's** decision **was** issued and all parties had the opportunity to address the issues at that time. <sup>2/</sup> Moreover, the record is barren of any suggestion that Respondents at any time complained about the pace of the proceedings in this case. F.T.C. v. J. Weinaarten. Inc., 336 **F.2d** 687, 691 (5th Cir. 1964), cert. denied, 380 U.S. 908 (1965). Accordingly, there is no basis to vacate the proposed decision because of delay in its issuance.

Respondents also urge that the proposed order be set aside based on the equitable doctrine of **laches**. Motion at 7-8. Leaving aside whether the government could be subject to the equitable defense of **laches**, Respondents would have to establish prejudice due to the delay in issuing the order. City of Gary, Indiana v. United States Department of Labor, 793 **F.2d** 873, 875

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<sup>2/</sup> (. . .continued)

following this discharge was brief, Respondents liability will be correspondingly limited because interim earnings will be deducted.

<sup>3/</sup> Many of the **cases** cited by Respondents involve delay by government agencies in bringing legal action. See, e.g., E.E.O.C. v. Westinahouse Electric Corn., 592 **F.2d** 484, 486 (8th Cir. 1979); Chromcraft Corn. v. United States Equal Employment Opportunity Commission, 465 **F.2d** 745, 746 (5th Cir. 1972). These cases are distinguishable from those concerning delays in adjudication because, in the former case, a defending party if unaware that legal action may be taken against it, might be unable to prepare a defense several years after the events giving rise to the cause of action. The record here provides ample evidence that Respondents were aware of the complaint here and its **pendency** before the Department of Labor. See, e.g., Motion, Exh. G.

(7th Cir. 1986). Since Respondents, for the reasons stated supra, have not shown prejudice, I reject this contention.

Additionally, Respondents raise several contentions against a finding that they violated the Act and are responsible for reinstating Complainant with **backpay**. Motion at 11-22. None of these arguments was raised previously by Respondents before the Secretary, <sup>4/</sup> see 29 C.F.R. § 8.9(b), notwithstanding that they should have been anticipated. I therefore decline to consider them in this motion. <sup>5/</sup>

Respondents argue that if **backpay** is awarded, it cannot be assessed for periods beyond the termination of the CETA program in this case or, alternatively, beyond the date CETA itself was repealed. Motion at 24-25. Part of this contention already has been answered in that Complainant was a probationary employee

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<sup>4/</sup> IDOC argued that it did not violate the Act by failing to follow **IDCCA's** grievance procedures, IDOC Exception at 2, but did not contest the reinstatement and **backpay** remedies if a violation was found. IDCCA contested the method for computing interest on the **backpay** award, but did not challenge the reinstatement or **backpay** remedies. IDCCA Brief in Opposition to Grant Officer at 1-2.

<sup>5/</sup> Respondents also allege that the Secretary should not have reached the substantive merits of Complainant's discharge from his employment. Motion at 10. The substantive merits were considered by the Jackson County Board and the Governor's Office of Manpower and Human Development, each of which found that Complainant's discharge was substantively improper. Grant Officer's Ex. (G.O. Ex.) 1, **Atch. 5-L**, M. At the hearing, Respondents did not raise, as a defense against a possible **backpay** award, the contention that the discharge was substantively proper. All of Respondents' exhibits attached to the motion pertaining to the discharge, Motion Exs. A-E, were part of the record before the **ALJ**. See G.O. Exs. 1, **Atch. 2-A**, B, C, 5-B; 2. My June 4 Order addressed the substantive merits to show that, although that issue was not litigated before the **ALJ**, she was justified in awarding **backpay**.

whose employment would not have ended with the termination of the CETA program in which he took part. Decision and Order to Show Cause at 2, 8. Because **backpay** is a make whole remedy, City of Chicago v. United States Department of Labor, 753 **F.2d** 606, 608 (7th Cir. 1985); County of Monroe, Florida v. United States Department of Labor, 690 **F.2d** 1359, 1362 (11th Cir. 1982), it is payable until reinstatement is offered. Moreover, because the violation took place before the repeal of CETA, the power to remedy that violation is not diminished. See 29 U.S.C. § 1591(e). I therefore reject the contention that **backpay** should be limited. <sup>6/</sup>

Contending that the Secretary should not award prejudgment interest, Respondents also argue in the alternative that the proposed rate of interest is too high. Motion at 30-33. Neither of these arguments was raised previously before the Secretary, <sup>7/</sup>

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<sup>6/</sup> Respondents assert that the effect of the stay pending the appeal before the Secretary was to stop the accrual of back pay and interest until the final decision was issued. Motion at 23. Respondents have cited no direct authority for this proposition, and to accept their position would deprive successful complainants from receiving a make whole remedy. See discussion **supra**.

<sup>7/</sup> IDCCA stated that it did not oppose the award of interest, but argued that it should be a variable rate rather than the high fixed rate proposed by the Grant Officer. IDCCA Brief in Opposition to Grant Officer at 1-2. The Decision and Order to Show Cause provides at 10 for a variable rate in accordance with CETA precedent. (Although the regulations at 29 C.F.R. Part 20 (1991) are not directly applicable in this case, I note that the rate of interest imposed here is consistent with the rate the Department of Labor "**shall**" seek in litigation to recover backwages. 29 C.F.R. § 20.58(a)).

and they will not be addressed, therefore, in response to Respondents' motion.

The payment order should be modified, Respondents argue, because the Illinois appropriation process may not allow for payment within nine months of the final order. Respondents now propose that payment be due after all proceedings regarding **backpay** are concluded and three months after an appropriation for the amount due is signed by the Governor. Motion at 33-34. IDCCA has stated previously that these payments can be made within six to nine months of a final order. Exception of IDCCA. Accordingly, upon consideration and in the interest of bringing this matter to conclusion, I decline to modify the payment due date.

In a separate exception to the Decision and Order to Show Cause, IDCCA, the grantee, seeks to have its liability limited to the period from June 28, 1978, to March 22, 1979, as found by the **ALJ**. Contrary to **IDCCA's** contention that it should not be responsible for the actions of another administrative agency, it is well established that a grantee is jointly and severally liable for the CETA violations of its subgrantees. San Diego Reaional Employment and Training Consortium v. U.S. Department of Labor, 713 **F.2d** 1441, 1444-45 (9th Cir. 1983); Milwaukee County v. Peters, 682 **F.2d** 609, 612-13 (7th Cir. 1982) (grantees have considerable autonomy in local administration of CETA programs and federal government is entitled to exact a corresponding accountability).

CONCLUSIONS AND ORDER

Having considered the responses to the Decision and Order to Show Cause, **I** adopt the decision, page **1** through page 10, line 17, in its entirety (copy appended). Accordingly:

1. The **ALJ's** determination that Complainant was improperly discharged is affirmed. Her orders of reinstatement and **backpay** also are affirmed.
2. The order requiring payment of the **backpay** award within twenty days is modified to allow payment within nine months of the date of my final order.
3. Interest is payable on the **backpay** at the rates established under 26 U.S.C. § 6621 (copy of applicable rates attached) from the date of discharge until the date of payment.
4. IDOC and IDCCA are jointly and severally liable for all amounts due Complainant and no payments shall be made either directly or indirectly with Federal funds.

SO ORDERED.

  
Secretary of Labor

Washington, D.C.

and twelve percent for large corporate underpayments.

Under the Internal Revenue Code, the rate of interest is determined on a quarterly basis, the rate on underpayments is one percent higher than the rate on overpayments, and the rate for large corporate underpayments is two percent higher than the rate on underpayments. The rate announced today is computed from the federal short-term rate based, on daily compounding determined during July 1991.

Rev. Rul. 91-50, announcing the new rates of interest, is attached and will appear in Internal Revenue Bulletin No. 1991-37, dated September 16, 1991.

#### Rev. Rul. 91-50

Section 6621 of the Internal Revenue Code establishes differential rates for allowance of interest on tax overpayments and assessment of interest on tax underpayments. Under section 6621(a)(1), the overpayment rate is the sum of the federal short-term rate plus 2 percentage points. Under section 6621(a)(2), the underpayment rate is the sum of the federal short-term rate plus 3 percentage points.

Section 6621(c) of the Code, as added by the Revenue Reconciliation Act of 1990, Pub.L. 101-508, section 11341(a)(2), 104 Stat. 1388 (1990), provides that for purposes of interest payable under section 6601 on any large corporate underpayment, the underpayment rate under section 6621(a)(2) shall be applied by substituting "5 percentage points" for "3 percentage points." See section 6621(c) and section 301.6621-3T of the Temporary Regulations on Procedure and Administration for the definition of a large corporate underpayment and for the rules for determining the applicable date. Section 6621(c) and section 301.6621-3T are generally effective for periods after December 31, 1990.

Section 6621(b)(1) of the Code provides that the Secretary shall determine the federal short-term rate for the first month in each calendar quarter.

Section 6621(b)(2)(A) of the Code provides that the federal short-term rate determined under sec-

tion 6621(b)(1) for any month shall apply during the first calendar quarter beginning after such month.

Section 6621(b)(3) of the Code provides that the federal short-term rate for any month shall be the federal short-term rate determined during such month by the Secretary in accordance with section 1274(d), rounded to the nearest full percent (or, if a multiple of  $\frac{1}{2}$  of 1 percent, the rate shall be increased to the next highest full percent).

Notice 88-59, 1988-1 C.B. 546, announced that in determining the quarterly interest rates to be used for overpayments and underpayments of tax under section 6621 of the Code, the Internal Revenue Service will use the federal short-term rate based on daily compounding because that rate is most consistent with section 6621 which, pursuant to section 6622, is subject to daily compounding.

Rounded to the nearest full percent, the federal short-term rate based on daily compounding determined during the month of July 1991 is 7 percent. Accordingly, an overpayment rate of 9 percent and an underpayment rate of 10 percent are established for the calendar quarter beginning October 1, 1991. The underpayment rate for large corporate underpayments for the calendar quarter beginning October 1, 1991, is 12 percent. These rates apply to amounts bearing interest during that calendar quarter.

Interest factors for daily compound interest for annual rates of 9 percent, 10 percent and 12 percent were published in Tables 15, 16 and 18 of Rev. Proc. 83-7, 1983-1 C.B. 583, 598, 599, and 601.

Annual interest rates to be compounded daily pursuant to section 6622 of the Code that apply for prior periods are set forth in the accompanying tables.

#### DRAFTING INFORMATION

The principal author of this revenue ruling is Marcia Rachy of the Office of Assistant Chief Counsel (Income Tax and Accounting). For further information regarding this revenue ruling, contact Ms. Rachy on (202) 566-3886 (not a toll-free call).

#### TABLE OF INTEREST RATES PERIODS BEFORE JUL. 1, 1975 — DEC. 31, 1986 OVERPAYMENTS AND UNDERPAYMENTS

Period	Rate	Daily Rate Table in 1983-1 C.B.
Before Jul. 1, 1975	6%	Table 2, pg. 586
Jul. 1, 1975—Jan. 31, 1976	9%	Table 4, pg. 588
Feb. 1, 1976—Jan. 31, 1978	7%	Table 3, pg. 587
Feb. 1, 1978—Jan. 31, 1980	6%	Table 2, pg. 586



Feb. 1, 1980—Jan. 31, 1982	12%	Table 5, pg. 588
Feb. 1, 1982—Dec. 31, 1982	20%	Table 6, pg. 588
Jan. 1, 1983—Jun. 30, 1983	16%	Table 22, pg. 605
Jul. 1, 1983—Dec. 31, 1983	11%	Table 17, pg. 600
Jan. 1, 1984—Jun. 30, 1984	11%	Table 41, pg. 625
Jul. 1, 1984—Dec. 31, 1984	11%	Table 41, pg. 625
Jan. 1, 1985—Jun. 30, 1985	13%	Table 19, pg. 602
Jul. 1, 1985—Dec. 31, 1985	11%	Table 17, pg. 600
Jan. 1, 1986—Jun. 30, 1986	10%	Table 16, pg. 599
Jul. 1, 1986—Dec. 31, 1986	9%	Table 15, pg. 598

TABLE OF INTEREST RATES  
FROM JAN. 1, 1987 — PRESENT

	Overpayments			Underpayments		
	Rate	Table	Pg.	Rate	Table	Pg.
Jan. 1, 1987—Mar. 31, 1987	8%	14		9%	15	598
Apr. 1, 1987—Jun. 30, 1987	8%	14	597	9%	15	598
Jul. 1, 1987—Sep. 30, 1987	8%	14	597	10%	15	598
Oct. 1, 1987—Dec. 31, 1987	9%	15	598	11%	16	599
Jan. 1, 1988—Mar. 31, 1988	10%	40	624	41	625	
Apr. 1, 1988—Jun. 30, 1988	9%	39	623	10%	40	624
Jul. 1, 1988—Sep. 30, 1988	9%	39	623	10%	40	624
Oct. 1, 1988—Dec. 31, 1988	10%	40	624	11%	41	625
Jan. 1, 1989—Mar. 31, 1989	11%	16	599	11%	17	600
Apr. 1, 1989—Jun. 30, 1989	11%	17	600	12%	18	601
Jul. 1, 1989—Sep. 30, 1989	11%	17	600	12%	18	601
Oct. 1, 1989—Dec. 31, 1989	10%	16	599	11%	17	600
Jan. 1, 1990—Mar. 31, 1990	10%	16	599	11%	17	600
Apr. 1, 1990—Jun. 30, 1990	10%	16	599	11%	17	600
Jul. 1, 1990—Sep. 30, 1990	10%	16	599	11%	17	600
Oct. 1, 1990—Dec. 31, 1990	10%	16	599	11%	17	600
Jan. 1, 1991—Mar. 31, 1991	10%	16	599	11%	17	600
Apr. 1, 1991—Jun. 30, 1991	9%	15	598	10%	16	599
Jul. 1, 1991—Sep. 30, 1991	9%	15	598	10%	16	599
Oct. 1, 1991—Dec. 31, 1991	9%	15	598	10%	16	599

RATES FOR LARGE CORPORATE UNDERPAYMENTS  
FROM JAN. 1, 1991 — PRESENT

	Rate	Table	Pg.
Jan. 1, 1991—Mar. 31, 1991	13%	19	602
Apr. 1, 1991—Jun. 30, 1991	12%	18	601
Jul. 1, 1991—Sep. 30, 1991	12%	18	601
Oct. 1, 1991—Dec. 31, 1991	12%	18	601

[¶ 46,431] IRS Information Letter, August 20, 1991.

**Retirement plans: Limitations on contributions and benefits: Governmental plans.** letter from Mr. Ken Yednock, Chief, Employee Plans Projects Branch, Internal Revenue Service, to Mr. August D. Fields, Godwin, Carlton & Maxwell, Dallas, Texas, the Internal Revenue Service answers various questions regarding the application of Code Sec. 415 generally and with respect to governmental plans as defined in Code Sec. 414(d). The letter cautions it is not a ruling and may not be relied on with respect to any specific transaction. References: ¶ 2662.04 and 26706.02.

This letter is in response to your request for general information, dated June 15, 1991, regarding the application of the limitations of section 415 under the Internal Revenue Code to state and local governmental plans, as defined in section 414(d) of the Code. First, you ask about several issues concerning section 415 in general, such as the inclusion of certain items as compensation, the application of the limits to disability and death benefits, and the treatment of employee and pick-up contributions. Second, you ask several

questions concerning the special limitation in section 415(b)(10) of the Code, as added by Technical and Miscellaneous Revenue Act of 1988.

Section 1. The following questions address certain provisions generally under section 415 of the Code.

Question 1. May contributions described in sections 403(b), 414(h)(Z), or 457 of the Code be included in the definition of compensation?

U.S. DEPARTMENT OF LABOR

SECRETARY OF **LABOR**  
WASHINGTON, D.C.

DATE: June 4, 1991  
**CASE NO. 79-CETA-181**

IN THE MATTER OF

TERRY O'BOYLE,

COMPLAINANT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER TO SHOW CAUSE

This case arises under the Comprehensive Employment and Training Act (**CETA or the Act**), 29 U.S.C. §§ 801-999 (**Supp. V 1981**), <sup>1/</sup> and regulations promulgated thereunder at 20 C.F.R. Parts 675-680 (1990). The subgrantee, Illinois Department of Corrections (IDOC), filed exceptions to that part of the Decision and Order (D. and O.) of Administrative Law Judge (**ALJ**) **Arline Pacht**, holding that IDOC was required to follow the grantee's procedures providing for prior notice and an opportunity to be heard before dismissing CETA participant Terry O'Boyle from employment. IDOC also challenged the **ALJ's backpay** order as contrary to state law, which requires such awards to be paid from special appropriations.

The grantee, Illinois Department of Commerce and Community Affairs (IDCCA), did not object to the **backpay** award, but did

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<sup>1/</sup> CETA was repealed effective October- 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1501-1791 (1988), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

except to the **ALJ's** order that if the award is **not paid** within twenty **days**, all CETA funding to IDCCA and IDOC would be revoked. **IDCCA** asked that the **ALJ's** order be modified to allow six to nine months to obtain the appropriation necessary to comply with the **backpay award**. The Grant Officer excepted to the **ALJ's** refusal to assess interest on the **backpay**. The case was accepted for review in accordance with the provisions of 20 **C.F.R.** § 676.91(f).

#### **BACKGROUND**

~~Complainant, Terry O'Boyle,~~ was-hired by **IDOC** on- December 12, 1977, as a recreation worker at-the **Meynard Correctional** Center. He became a probationary employee on January 11, 1978, and would have attained certified status under the Illinois civil service system on July 11, 1978. Transcript (T.) at 169; D. and O. at 3.

On June 9, 1978, Complainant was advised by his supervisor that his employment was being **terminated** and he would no longer be permitted **access to** the prison **facility**. He later received a **six** month evaluation form with notice of his discharge for unsatisfactory performance. **Id.**; **Grant Officer's Exhibit (G.O. Ex.) 1, Atch. 2-A.** Complainant's pay also was terminated-the same day, **T. at 87**, 128, 177; D. and O. at 3, and he received notice on **June 14, 1978, from the Illinois** Department of personnel--that his-formal--discharge was effective on **June 19**, 1978. **Id.**; G.O. Ex. 1, **Atch. 5-A.**

Complainant responded to the discharge by filing a written grievance on June 26, 1978, with the Director for the Jackson

county **Board, program agent for the grantee. D. and O. at 3-4;** ....  
**G.O.** Ex. 1, Atchs. **5-C**, D. The Jackson County Board held a  
 hearing on March 22, 1979, and, in a report dated March 27, 1979,  
**concluded** that Complainant's grievance had merit and he was  
 therefore improperly discharged from his employment. **G.O.** Ex. 1,  
**Atch. 5-L.** On April 25, 1979, the Governor's-Office of Manpower  
 and Human Development-issued-a-Notice-of-Final-Action **affirming-**  
 the Jackson County Board's\_determination that Complainant's  
 termination was-substantively improper. It also found. **that the** \_\_\_\_  
 discharge was procedurally deficient in that Complainant was not  
**given** five days in which to respond before being **released as** \_\_\_\_  
**required** by applicable CETA rules and regulations. D. and O. at  
**4-5;** G.O. Ex. 1, **Atch. 5-M.** IDOC appealed the Notice of Final \_\_\_\_  
 Action and the Grant Officer, in a Final Determination dated  
 June 28, 1979, reversed, concluding that no evidence was  
 developed -to indicate that-Complainant's discharge violated the  
 Illinois state personnel **rules**, the Act, or the CETA regulations.  
 G.O. Ex. 3.

In reversing **the** Grant Officer's determination, the **ALJ**\_\_\_\_  
 noted **that under 29 C.F.R. § 98.26(a) (1979) a grantee must**\_\_\_\_\_  
 establish procedures to govern the resolution of any issue which  
 may arise between the grantee, its subgrantees and the CETA  
 participant. D. and O. at 6. Further, if the issue involved an  
 adverse action, the grantee had to assure that-the procedures. ..  
**guaranteed written notice and an opportunity** to respond. D. and  
 O. at 7. The **ALJ** then acknowledged that IDCCA, the grantee here,

had established the required procedures in a handbook entitled "CETA Grievance Procedures." The handbook required **that a CETA** participant be given five working days to respond to a proposed adverse **action. Id.**

The ALJ recognized that Section 98.26(a) did not require **notice and an opportunity** to respond prior to adverse action, <sup>2/</sup> but concluded that the **grantee's procedures mandating** prior notice were not inconsistent with the regulation. D. and O. at 8. She concluded that **Complainant's discharge**, as a practical matter, **occurred on June 9** when he was barred from the prison facility and his wages ceased; --In a **technical sense, she found** that IDOC provided Complainant with more than five days notice as **required by the grantee's procedures** because--the discharge did not become final until ten days later. **Id.** The ALJ concluded, however, that Complainant was not given the requisite opportunity to respond. D. and O. at 940.

To remedy this **violation, the ALJ ordered that: (1)** Complainant be reinstated in the same or similar position as a probationary-employee with one month remaining before becoming eligible **for certification; (2) all adverse** comments in his **personnel file be** expunged; (3) **backpay** less interim earnings be paid Complainant from **June 9, 1978**, until reinstatement is

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<sup>2/</sup> Prior to its amendment in 1976, Section 98.26(a) stated in relevant part "[w]hen the prime sponsor or eligible applicant proposes to take adverse action. . . . The regulation in effect at the time of the hearing stated "[w]hen the prime sponsor or eligible applicant takes an adverse action . . . ." 29 C.F.R. § 98.26(a) (1979).

formally offered: (4) **backpay** not-be-paid-directly or indirectly- - with CETA funds: and (5) failure to comply with the reinstatement and **backpay** orders within twenty days would result in the revocation of CETA funding to IDCCA and IDOC. D. and O. at 14, 15. The **ALJ** denied interest on the **backpay** award, citing an absence of authority.

### DISCUSSION

#### I. Complainant's Discharge.

IDOC contends-that-it-was not obliged-to-f&low--the ---- -- - grantee's grievance procedures because, by **requiring** that-CETA participants -have an opportunity-to **respond before adverse action** is taken, the procedures are contrary to the provisions of Section **98.26(a)**. IDOC Exception at 2. As IDOC **argues, Section 98.26(a)** as amended does not require that CETA participants be given an opportunity to be heard prior to adverse action. **It** does not follow, however, that grantees are precluded from including such-a-provision-in -the grievance procedures-they-are required to establish.-

The comments accompanying the amended-Section 98.26(a) **state** that "**the** language-was revised- to allow for complaint\_ procedures **which** notify participants in writing at the same time as the adverse **action is taken.**" **41 Fed. Reg. 26,338** (1976) (emphasis added). **By using the word "allow," the drafters of Section 98.26(a)** plainly intended that grantees have the discretion to establish procedures which either required or did not require opportunity to be heard before adverse action was taken against

CETA participants.--- I--therefore-reject the contention that IDCCA's grievance procedures are **contrary to** Section 98.26(a) and hold that IDOC was required to follow them when it terminated Complainant's employment. Inasmuch as IDOC failed to follow the grievance procedures, the **ALJ's** finding that Complainant was improperly discharged should be affirmed. - -- ----

In addition to the -procedural-violation-, -the **record supports** the conclusion of the Jackson-County Board **and the Governor's** Office of Manpower-and-HumanDevelopment that Complainant's discharge **was not substantively justified.** See G.O. Ex. 1, Atchs. 5-L, M. Complainant's discharge was predicated on an evaluation report which stated that Complainant did not meet his job objectives in six of eight areas. G.O. Ex. 1, **Atch. 2-A.** After filing his grievance, however, Complainant-provided **the** Director of the Jackson County Board with records and several memoranda to refute the statements in the evaluation report. Complainant's Exhibits **2C, D, E, F, G and 4B.** At no time during **the** grievance process did IDOC cooperate by providing the basic **information** needed to resolve the grievance, see G.O. Ex. 1, Atchs. **5-H, L and M, and** IDOC offered no reasons for its failure to do **so.** Furthermore, representatives of IDOC failed to attend **the grievance** hearing notwithstanding **that IDOC acknowledged** it had been notified of the hearing **3/.** -See **G.O. Ex. 1 at 10.**

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**3/** IDOC advised that it did not attend the hearing because the Director **for** the Jackson County Board had already stated his opinion that Complainant was fired for unjust, unsubstantiated reasons and it would, therefore, not be possible to have a fair  
(continued...)

The Jackson County **Board**, after hearing Complainant%----- presentation and having no evidence to rebut it, concluded that Complainant was improperly discharged from his employment. G.O. **Ex. 1, Atch. 5-L.** The Governor's Office affirmed, noting that **IDOC's** refusal to participate or cooperate in the grievance proceeding resulted in an entirely one-sided record which could **lead to** only one decision. **In view** of the absence of evidence in support of the reasons expressed for Complainant% **discharge**, **I** find that the-Jackson--County-Board **and the Governor's** Office \_\_\_\_\_ properly **concluded that the discharge** was not substantively-- - - - justified.

## II. Relief.

None of the parties has excepted to the merits of the reinstatement and **backpay** orders and there is nothing in the record which demonstrates that-reinstatement and **backpay** would be inappropriate in this case. <sup>4/</sup> Moreover, reinstatement is a

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<sup>3/</sup> (. . .continued)

and impartial hearing. G.O. **Ex. 1** at 10-11. While it is true that the Director responded with the above opinion at the request of the Governor% Office, it was qualified by the words "**at this time**" and was based almost entirely on Complainant's evidence because **IDOC** had ~~failed to cooperate in the grievance~~ process. **Even** if an impartial hearing could not have been obtained, which is by no means clear, **IDOC** may have benefitted by attending the hearing and producing evidence which could have been considered in the grievance-process and-before the **ALJ**.

<sup>4/</sup> **Those remedies may be** improper in cases where the **procedural** deprivations-are-essentially harmless-error and the **complainant's** discharge-is **substantively justified**. See County of Monroe, Florida v. United States Department of Labor, 690 F.2d 1359, 1362 (11th Cir. 1982); City of Boston v. Secretary of Labor, 631 F.2d 156, 161 (1st Cir. 1980); Armando Machado v. South Florida Employment and Training Consortium, Case No. 80-CETA-194, slip (continued...)



proper remedy because Complainant was a probationary employee whose employment was not limited to the duration of a particular CETA program. Cf. Broome v. United States Department of Labor, 870 F.2d 95, 101 (3d Cir. 1989) (no assurance that complainant would have been selected for available jobs following staff reduction); New York Urban Coalition v. United States Department of Labor, 731 F.2d 1024, 1032 (2d Cir. 1984) (backpay not proper where award went beyond time that CETA project ended); In the Matter of John Tibbetts and Richard Bremner v. Vermont Comprehensive Employment and Training Office, CETA, Case Nos. 81-CETA-254, 81-CETA-255, slip op. at 9, Sec. Decision July 25, 1984 (when regional councils went out of existence, reason for complainant's employment also ceased to exist). Absent his improper discharge, Complainant would have become a permanent employee of the State of Illinois within one month. See In the Matter of City of Passaic, New Jersey, Program Agent, and Passaic County, New Jersey, Prime Sponsor, Case No. 78-CET-112, slip op. at 6, Sec. Decision April 25, 1990, aff'd, No. 90-3393 (3d Cir. Jan. 17, 1991); Armando Machado v. South Florida Employment and Training Consortium, Case No. 80-CETA-494, slip op. at 2, Sec.

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4 (. . .continued)

op. at 3, Sec. Decision July 29, 1983; In the Matter of Ms. Blanche Field and the City of Boston, Case No. 77-CETA-102, slip op. at 1, Sec. Decision September 29, 1982. Both the grantee's program agent and the Governor's Office of Manpower and Human Development concluded on the merits that Complainant's discharge was improper, G.O. Ex. 1, Atchs. 5-L, M. The Grant Officer's final determination focuses on the procedural issue in its conclusion that there is no evidence to indicate that the termination violated either the Illinois personnel rules, the Act or the CETA regulations. G.O. Ex. 3.

**Decision** February 19, 1982 (as a regular employee, under Consortium's policies, rather than a CETA participant employee, complainant was entitled to reinstatement). Accordingly, the **ALJ's** holding that IDOC must Offer Complainant reinstatement-in the same or similar position with one month of probationary status remaining until he becomes eligible for certification under the Illinois civil service system should be **affirmed**. The **ALJ's order that backpay** less interim earnings is due **from** the date of discharge until the date reinstatement is offered also should be affirmed.

Both **IDOC** and **IDCCA** challenge the **ALJ's** order that **backpay** be disbursed within twenty days, contending that it is contrary to state law that requires these expenditures be made from **special** appropriations which take six to nine months to obtain. **Exception of-IDOC at 3; Exception of IDCCA.** Although **CETA** and adjudications thereunder would normally preempt conflicting state laws, **upon consideration** of the parties' filings, I conclude that **payment** within nine months would reasonably satisfy the goals of the CETA **program.**

The **Grant** Officer has excepted to the **ALJ's** conclusion that the **backpay** award should not include interest and argues that **interest should be awarded** at the rate of 12 1/2% from the date of **violation to the date of payment.** Grant Officer Exception; Grant Officer's Memorandum in Response at 8. **IDCCA does not oppose** the award of interest, but argues that the rate should vary to **reflect the** usual rate for the period involved rather than a high

fixed rate. **IDCCA** also asks for a cutoff date for any interest due. **IDCCA** Brief in Opposition to Position of Grant Officer at 1-2.

Interest is an appropriate part of a **backpay** award, the purpose of which is to make the aggrieved party whole. County of Monroe, 690 F.2d at 1362. It accrues until **backpay** is actually paid whether the delay is long or short. Donovan v. Sovereign Security, Ltd., 726 F.2d 55, 58 (2d Cir. 1984); In the Matter of Kenneth D. Taylor v. Hampton Recreation and Hampton Manpower Services, Case No. 82-CETA-198, slip op. at 10, Sec. Decision April 24, 1987. The proper rate of interest on **backpay** awards is a variable rate for the periods in question established under 26 U.S.C. § 6621. In the Matter of Tommie Broome v. City of Camden Employment and Training Administration, Case No. 80-CETA-253, slip op. at 17, Sec. Decision December 14, 1987, aff'd, Broome v. United States Department of Labor, 870 F.2d 95 (3d Cir. 1989).

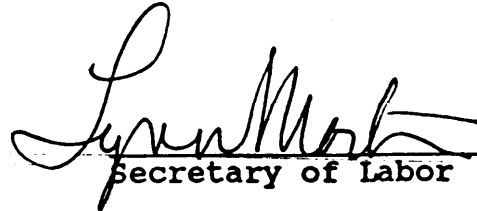
#### CONCLUSIONS AND ORDER

Accordingly, I propose to make the following conclusions and order:

The **ALJ's** determination that Complainant was improperly discharged is affirmed. Her orders of reinstatement and **backpay** also are affirmed. The order requiring payment of the **backpay** award within twenty days is modified to allow payment within nine months of the date of my final order. Interest is payable on the **backpay** at the rates established under 26 U.S.C. § 6621 (copy of applicable rates attached) from the date of discharge until the date of payment. IDOC and IDCCA are jointly and severally liable for all amounts due Complainant and no payments shall be made either directly or indirectly with Federal funds.

The parties may show cause within 40 days of receipt of this order why the above decision and proposed conclusions and order, should not be adopted as the final order in this case.

SO ORDERED.

  
Secretary of Labor

Washington, D.C.

# News Release

For Release: 11/8/89

Department of the Treasury  
Internal Revenue Service  
Public Affairs Division  
Washington, DC 20224

Media Contact: Tel. (202) 566-4024  
Copies: Tel. (202) 566-4054

IR-89-137

Washington -- The Internal Revenue Service today announced that interest rates for the calendar quarter beginning Jan. 1, 1990, will remain at ten percent for overpayments and eleven percent for underpayments.

Under the Tax Reform Act of 1986, the rate of interest is determined on a quarterly basis, and the rate on underpayments is one percent higher than the rate on overpayments. The rate announced today is computed from the federal short-term rate based on daily compounding determined during October 1989.

Rev. Rul. 89-125, announcing the new rates of interest, is attached and will appear in Internal Revenue Bulletin No. 1989-48, dated November 27, 1989.

X X X

Part I .

Section **6621.--** Determination of Interest Rate

**26 CFR.** 301.6621-1: Interest rate

Rev. Rul. **89-125**

Section 6621 of ~~the Internal Revenue~~ Code establishes differential rates **for** allowance of interest on tax overpayments and assessment of **interest** on tax underpayments. Under section 6621(a)(1), the overpayment rate is ~~the sum~~ of the **short-term federal rate plus 2** percentage **points**. Under section 6621(a)(2), the underpayment rate is the sum of the short-term **federal rate plus 3** percentage points.

Section 6621(b)(1) of the Code provides that the Secretary **shall** determine the federal short-term rate for the first **month** in each **calendar quarter**.

Section **6621(b)(2)(A)** of the Code provides that the federal short-term rate determined under **section 6621(b)(1)** for any month shall **apply during the first calendar** quarter **beginning after** -Such month.

Section **6621(b)(2)(B)** of the Code provides that in determining the addition to tax under section 6654 for failure to pay estimated

**tax** for any taxable **year**, the federal **short-term** rate which applies during the **3rd** month following such taxable **year** shall also apply during the first 15 **days of the 4th** month following such taxable year.

Section 6621(b)(3) **of** the Code provides that the federal **short-term** rate for any month shall be the federal **short-term** rate **determined** during such month by the Secretary in accordance with section **1274(d)**, **rounded** to the nearest full percent (or, if a multiple of  $\frac{1}{2}$  of 1 percent, the rate shall be increased to the next highest full percent).

**Notice 88-59**, 1988-1 **C.B.** 546, announced that in determining the quarterly interest rates to be used for overpayments and **underpayments** of tax under section 6621 of the Code, the Internal Revenue Service will use the federal short-term rate based on **daily compounding** because that rate **is** most consistent with section **6621** which, pursuant to section 6622, **is** subject to daily compounding.

Rounded to the nearest full percent, the federal short-term rate based on daily compounding determined during the month **of** October 1989 is 8 percent. Accordingly, an overpayment rate of **10** percent and an underpayment rate of 11 percent is established for the calendar quarter beginning January 1, 1990. The rates apply to amounts bearing interest during that calendar quarter.

The **11** percent rate also applies to estimated tax **underpayments** for the quarter and for the first 15 days **in** April.

Interest factors for daily **compound** interest for annual rates

of 10 percent and 11 percent were **published** in Tables **16** and **17** of Rev. **Proc. 83-7**, 1983-1 C.B. 583, 599, 600.

Annual interest **rates** to be compounded daily pursuant to section 6622 **of the** Code that apply for prior periods are set forth in the accompanying tables.

**DRAFTING INFORMATION**

The principal author of this revenue ruling is Mary Jane Kossar of the Office of the Assistant Chief Counsel (Income Tax & Accounting.) For further information regarding this revenue ruling contact Mrs. Kossar on (202) 566-3453 (not a toll-free call).



TABLE OF INTEREST RATES

PERIODS BEFORE JUL. 1, 1975 - DEC. 31, 1986

OVERPAYMENTS AND UNDERPAYMENTS

PERIOD	RATE	DAILY RATE TABLE IN 1983-1 C.B.
<b>Before Jul. 1, 1975</b>	6%	Table 2, pg. 586
Jul. 1, 1975--Jan. 31, 1976	9%	Table 4, pg. 588
Feb. 1, 1976--Jan. 31, 1978	7%	Table 3, pg. 587
Feb. 1, 1978--Jan. 31, 1980	6%	Table 2, pg. 586
Feb. 1, 1980--Jan. 31, 1982	12%	Table 5, pg. 588
Feb. 1, 1982--Dec. 31, 1982	20%	Table 6, pg. 588
Jan. 1, 1983--Jun. 30, 1983	16%	Table 22, pg. 605
Jul. 1, 1983--Dec. 31, 1983	11%	Table 17, pg. 600
Jan. 1, 1984--Jun. 30, 1984	11%	Table 41, pg. 625
Jul. 1, 1984--Dec. 31, 1984	11%	Table 41, pg. 625
Jan. 1, 1985--Jun. 30, 1985	13%	Table 19, pg. 602
Jul. 1, 1985--Dec. 31, 1985	11%	Table 17, pg. 600
Jan. 1, 1986--Jun. 30, 1986	10%	Table 16, pg. 599
Jul. 1, 1986--Dec. 31, 1986	9%	Table 15, pg. 598

TABLE OF INTEREST RATES

FROM JAN. 1, 1987 - PRESENT

OVERPAYMENTS				UNDERPAYMENTS			
RATE TABLE PG.				RATE TABLE PG.			
Jan. 1, 1987--Mar. 31, 1987	8%	14	597	9%	15	598	
Apr. 1, 1987--Jun. 1, 1987	8%	14	597	9%	15	598	
Jul. 1, 1987--Sep. 30, 1987	8%	14	597	9%	15	598	
Oct. 1, 1987--Dec. 31, 1987	9%	15	598	10%	16	599	
Jan. 1, 1988--Mar. 31, 1988	10%	40	624	11%	41	625	
Apr. 1, 1988--Jun. 1, 1988	9%	39	623	10%	40	624	
Jul. 1, 1988--Sep. 30, 1988	9%	39	623	10%	40	624	
Oct. 1, 1988--Dec. 31, 1988	10%	40	624	11%	41	625	
Jan. 1, 1989--Mar. 31, 1989	10%	16	599	11%	17	600	
Apr. 1, 1989--Jun. 30, 1989	11%	17	600	12%	18	601	
Jul. 1, 1989--Sep. 30, 1989	11%	17	600	12%	18	601	
Oct. 1, 1989--Dec. 31, 1989	10%	16	599	11%	17	600	
Jan. 1, 1990--Mar. 31, 1990	10%	16	599	11%	17	600	

CERTIFICATE OF SERVICE

Case Name: In the Matter of Terry O'Boyle

Case No. : 79-CETA-181

Document : Decision and Order to Show Cause

A copy of the above-referenced document was sent to the following persons on JUN - 4 1991.

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CERTIFICATE OF SERVICE

Case Name: In the Matter of **Terry O'Boyle**

Case No. : **79-CETA-181**

Document : Final Decision and Order

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